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**MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY**

PETER BYORTH and ANNA McKEAN, on  
behalf of themselves and all those similarly  
situated,

Plaintiff,

vs.

USAA CASUALTY INSURANCE  
COMPANY,

Defendant.

Case No.: DV-15-0511

Judge Gregory R. Todd

**ORDER**

**INTRODUCTION**

This matter comes before the Court by a Motion to Compel filed by Plaintiffs, Peter Byorth and Ann McKean (Byorth and McKean), on January 6, 2016. Defendant USAA Casualty Insurance Company ("USAA") filed a response on January 27, 2017. Plaintiffs filed their reply on February 9, 2017. Oral argument was held on March 10, 2017. Having read the motions and their supporting briefs, this Court deems this matter submitted.

**STATEMENT OF RELEVANT FACTS**

1 The Plaintiffs in this matter were both injured in motor vehicle accidents. Byorth  
2 and McKean were both covered under USAA's med-pay policies. In both cases, USAA  
3 delayed or denied coverage and declared that several portions of the medical costs  
4 were not medically necessary after a review of USAA's affiliate Auto Injury Solutions  
5 (AIS). In the Complaint filed on April 25, 2015, Byorth and McKean alleged that USAA  
6 breached their fiduciary duty and contractual obligation to the Plaintiffs. Additionally,  
7 Byorth and McKean alleged that USAA had violated Montana Unfair Trade Practices  
8 Act (UTPA) and sought to certify a class of persons similarly situated pursuant to Rule  
9 23 of the Montana Rules of Civil Procedure. This Court certified the class pursuant to  
10 Rule 23(a) on December 29, 2015.

11 USAA filed a notice of appeal on January 7, 2016 objecting to the class  
12 certification. The Montana Supreme Court reversed the class certification and  
13 remanded for further proceedings consistent with the Supreme Court's opinion on  
14 December 12, 2016.

### 15 LEGAL STANDARD

16 In Montana, "parties may obtain discovery regarding any non-privileged matter  
17 that is relevant to any party's claim or defense - including the existence, description,  
18 nature, custody, condition, and location of any documents or other tangible things and  
19 the identity and location of persons who know of any discoverable matter. The  
20 information sought need not be admissible at the trial if the discovery appears  
21 reasonably calculated to lead to the discovery of admissible evidence." Mont. R. Civ.  
22 P. 26(b)(1). Furthermore, "[t]he purpose of discovery is to promote the ascertainment of  
23 truth and the ultimate disposition of the lawsuit in accordance therewith. Discovery  
24 fulfills this purpose by assuring the mutual knowledge of all relevant facts gathered by  
25 both parties which are essential to proper litigation." *Richardson v. State*, 2006 MT 43,

1 ¶ 22, 331 Mont. 231, 130 P.3d 634 (citing *Massaro v. Dunham* (1979), 184 Mont. 400,  
2 405, 603 P.2d 249, 252).

### 3 DISCUSSION

4  
5 **I. USAA must comply with Plaintiff's discovery requests because they are**  
6 **relevant to her claim, are geographically and temporally appropriate, and,**  
7 **confidential information is protected pursuant to court order.**

8 In Montana, the "rules of civil procedure are premised upon a policy of liberal  
9 and broad discovery." *Patterson v. State*, 2002 MT 97, ¶ 15, 309 Mont. 381, 46 P.3d  
10 642. The Montana legislature enacted the UTPA to discourage unfair and deceptive  
11 trade practices. Section 33-18-101, MCA. Thus, the UTPA prohibits any person from  
12 engaging in a *general business practice* that would result in unfair claim settlements.  
13 *See generally*, § 33-18-201 (1), et al. (emphasis added). Although, a plaintiff is not  
14 required "to prove that the violations were of such frequency as to indicate a general  
15 business practice," the plaintiff may nonetheless seek discovery and information  
16 regarding the defendant's business practice because it is relevant for assessing the  
17 appropriateness of punitive damages. Section 33-18-242 (2), MCA; *Lorang v. Fortis*  
18 *Ins. Co.*, 2008 MT 252, ¶ 93, 345 Mont. 12, 192 P.3d 186; § 33-18-242 (4), MCA.

19 First, USAA claims that the Plaintiffs' allegations in the Complaint are restricted  
20 to issues regarding "file reviews" and "coding errors." Thus, since the Montana Rules of  
21 Civil Procedure limit discovery to "any non-privileged matter that is relevant to any  
22 party's claim or defense" then discovery ought to be limited "file reviews" and "coding  
23 errors." Mont. R. Civ. P. 26(b). The Court is unpersuaded by this argument. A review  
24 of the Complaint demonstrates that the Plaintiffs allege that USAA violated the UTPA,  
25 fiduciary and contractual obligations. The allegations are general and references to  
"file review" and "coding errors" are short and plain statement[s] of the claim showing

1 that the pleader is entitled to relief." Mont. R. Civ. P. 8(a)(1). Limiting future discovery  
2 based on the limited access to evidence a plaintiff has at the beginning of a case would  
3 undercut the principle of notice pleading.

4 Furthermore, USAA claims, partly based on boilerplate language, that some of  
5 the requests for production regarding budgets, billings and statistical documents are  
6 overly broad and unduly burdensome, or, that the information sought is confidential.  
7 Discovery need not be admissible to be discoverable, and, given the liberal discovery  
8 rules in Montana, the Court finds that USAA's concerns regarding the burden and  
9 breadth of the discovery are appropriately addressed though a geographic limitation to  
10 Montana, and a three-year limit for any information sought. Mont. R. Civ. P. 26(b)(1);  
11 *Patterson*, ¶ 15. Further, there is already a protective order in place to protect  
12 confidential information that may appear as a result of discovery.

13 USAA also objects to producing the Market Conduct Examination (MCE) for the  
14 states in which it offers insurance. MCE's are documents detailing an insurers business  
15 practices in that state. USAA claims that the "Montana Department of Insurance has  
16 not conducted any MCE in the past six years," and, thus it has nothing to produce in  
17 relation to Montana and any other MCE are both geographically or temporally irrelevant  
18 despite the language of the UTPA. Section 33-18-242 (2), MCA. However, the  
19 assessment of "general business practices" is central to the UTPA. Section 33-18-101;  
20 *See generally*, § 33-18-201 (1), MCA. Section 33-18-242 (2), MCA, clarifies that the  
21 plaintiff does not have an affirmative duty to prove that unfair trade practices constitute  
22 the general business practice of the defendant in order to prevail. However, that  
23 provision does not reduce the effect of a central phrase of the UTPA. Section 1-3-233,  
24 MCA. In fact, § 33-18-242(2) is a restriction on defendants from using a plaintiff's  
25 inability to prove that his injury was a result of a general business practice as an

1 affirmative defense. Ultimately, the Supreme Court addressed this issue in *Lorang*,  
2 stating if a jury should decide "that punitive damages should be awarded here,  
3 assessing a proper amount requires analysis of the reprehensibility of [the defendant's]  
4 conduct, which is determined in part by considering whether this was an isolated  
5 incident." *Lorang*, ¶ 93. Consequently, a document prepared to survey and assess the  
6 business practices of an insurer is highly relevant to a claim bought under the UTPA.

7 Further, USAA objects to production of discovery because USAA does not  
8 possess those files. In fact, USAA suggested that the Plaintiffs subpoena AIS to  
9 recover information that is normally associated with an insured's claim file. However, a  
10 review of the contract between AIS and USAA (Master Service Agreement) clarifies  
11 that USAA has access to these files within AIS's system. In fact, Article 7.6.4 of the  
12 Master Services Agreement explicitly states that "[Auto Injury Solutions] shall use  
13 reasonable best efforts to provide USAA information on all files processes, including  
14 but not limited to a history of all Claims, both opened and closed . . . in a form specified  
15 by USAA." Thus, the Court is unpersuaded by that argument, also.

16 Although USAA produced the contract between AIS and USAA, known as the  
17 Master Services Agreement (MSA), significant portions of it are redacted. USAA claims  
18 that none of that information is relevant to Plaintiffs claim. Although that may be the  
19 case, it would be difficult to establish that without an in camera review of the  
20 unredacted MSA.

21 Finally, Plaintiffs request that USAA produce copies of discovery responses and  
22 depositions in a class action suit in which USAA was involved in Washington. Plaintiffs  
23 suggest that the *MySpine* case is factually similar and feature the same allegations that  
24 are at issue here. USAA disagrees with this characterization. The Court has insufficient  
25 information to determine the relevancy of the *MySpine* case depositions and discovery

1 responses. Thus, until Plaintiff produces some court document from Washington  
2 demonstrating the similarity between *MySpine* and this case this Court will not render a  
3 decision compelling production of documents related thereto.

4 In conclusion, the Court will note that the Montana Supreme Court remanded  
5 this case for further discovery in order to satisfy the evidentiary needs of a Rule 23  
6 certification. Mont. R. Civ. P. 23(a).

7  
8 **ORDER**

9 For the reasons stated above,

10 **IT IS HEREBY ORDERED** that Plaintiffs Motion to Compel is **GRANTED**.

11 **IT IS FURTHER ORDERED** that USAA shall produce the most recent copy of its  
12 Market Conduct Examination for Montana.

13 **IT IS FURTHER ORDERED** that USAA shall provide the Court with an  
14 unredacted copy of its "**MASTER SERVICES AGREEMENT**" for an in camera review  
15 by **April 7, 2017**.

16  
17 **DATED AND ORDERED** this 16<sup>th</sup> day of March, 2017.

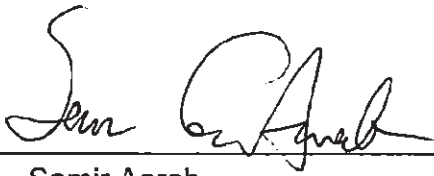
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20 **HON. GREGORY R. TODD**, District Court Judge  
21 DV-15-0511

22 cc. John Heenan and Colette Davies, Attorneys for Plaintiff  
23 Jessica G. Scott and Ian McKintosh, Attorneys for Defendant

24 **CERTIFICATE OF SERVICE**

25 This is to certify that the foregoing was caused to be served upon the parties or  
their attorneys of record at their last-known address this 16th day of March, 2017.

1 By



Samir Aarab

Law Clerk to HON. GREGORY R. TODD

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